

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Vonage Holdings Corp. Petition for)	WC Docket No. 03-211
Declaratory Ruling Concerning an Order of)	
the Minnesota Public Utilities Commission)	DA 03-2952
)	

**COMMENTS
of the
ORGANIZATION FOR THE PROMOTION AND
ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES**

I. INTRODUCTION AND SUMMARY

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) hereby submits these comments in response to the Federal Communications Commission's (Commission or FCC) Public Notice¹ seeking comment on the September 22, 2003 Petition for Declaratory Ruling² filed by Vonage Holdings Corporation (Vonage). OPASTCO is a national trade association representing over 500 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve over 3.5 million customers. All OPASTCO members are rural telephone companies as defined in 47 U.S.C. §153(37).

OPASTCO members are among the industry leaders in bringing new, innovative

¹ *Pleading Cycle Established for Comments on Vonage Petition for Declaratory Ruling*, WC Docket No. 03-211, Public Notice, DA 03-2952 (rel. Sept. 26, 2003).

² *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211 (filed Sept. 22, 2003) (petition).

services to consumers. Rural consumers have been among the first to enjoy advances such as digital switching, broadband access, and video over digital subscriber line (DSL) services. If the Commission seeks to continue encouraging infrastructure and service deployment in rural areas, it must avoid playing favorites in the marketplace. Therefore, OPASTCO urges the Commission to deny Vonage's petition, and declare that its Voice over Internet Protocol (VoIP) service, which provides a direct substitute for traditional telephone service, should be classified as a telecommunications service. Furthermore, as VoIP services such as the one offered by Vonage continue to proliferate, it is critical for the Commission to expand the base of contributors to the universal service fund (USF) to include all facilities-based broadband Internet access providers.

II. THE VOICE SERVICE OFFERED BY VONAGE IS A TELECOMMUNICATIONS SERVICE AND SHOULD BE CLASSIFIED AS SUCH

A. Vonage promotes its service as a substitute for standard telephone service, and services that are substitutable for one another should be treated equitably

In its 1998 Report to Congress,³ the Commission observed that “the classification of a service under the [Telecommunications Act of 1996 (1996 Act)] depends on the functional nature of the end-user offering.”⁴ With that in mind, it is significant that Vonage advertises its service as “an all-inclusive home phone service that replaces your current phone company.”⁵ If the services offered by a LEC, which are classified as telecommunications services, can be replaced with the Vonage service offering, then this substitute service must also be a telecommunications service based on the Commission's

³ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd, 11501 (1998) (1998 Report).

⁴ *Ibid.*, para. 86.

“functionality” test.

By offering consumers a replacement service for a LEC’s service offering, while simultaneously asserting to policymakers that it is not offering a telecommunications service, Vonage is trying to gain the upper hand over its LEC competitors through regulatory arbitrage. However, the Commission should adhere to the principles of competitive and technical neutrality in order to avoid having government policy, rather than consumer choices, determine the outcome in the marketplace. Clearly, services that provide direct substitutes for each other should not be subject to different regulatory classification.⁶ To classify providers of voice service differently based solely on the technology they use to transmit voice signals would be blatantly discriminatory. Therefore, the Commission should deny the petition, and declare Vonage’s service to be a telecommunications service.

B. The Commission has correctly determined that services such as Vonage’s bear the characteristics of “telecommunications services”

Vonage’s service permits its users to seamlessly contact, and be contacted by, users of the standard public switched telephone network (PSTN),⁷ further underscoring the Commission’s “functionality” test. That is, from the end user’s perspective, Vonage’s service is functionally equivalent to the services offered by a local telephone company. The petition acknowledges that “Vonage’s service uses computerized media

⁵ Petition, MN Docket No. P6214/C-03-108, Exhibit 1. *See also* http://www.vonage.com/learn_tour.php.

⁶ “[S]ound regulatory policy should, where appropriate, harmonize regulatory rights and obligations that are attached to the provision of similarly-situated services across different technological platform[s].” *Remarks of Michael K. Powell, Chairman, Federal Communications Commission, at the Broadband Technology Summit, US Chamber of Commerce, Washington, D.C. (April 30, 2002)*, available at <http://www.fcc.gov/Speeches/Powell/2002/spmcp205.html>.

⁷ Petition, pp. 1-2.

gateways that provide an interface between the Internet and the PSTN.”⁸ This corresponds to the scenario addressed by the Commission in its 1998 Report to Congress when it correctly reasoned that such services bear the characteristics of telecommunications services, not information services:

Specifically, when an IP telephony service provider deploys a gateway within the network to enable phone-to-phone service, it creates a virtual transmission path between points on the public switched telephone network over a packet-switched IP network. These providers typically purchase dial-up or dedicated circuits from carriers and use those circuits to originate or terminate Internet-based calls. From a functional standpoint, users of these services obtain only voice transmissions, rather than information services such as access to transforming, processing, retrieving, utilizing, or making available information. Thus, the record currently before us suggests that this type of IP telephony lacks the characteristics that would render them “information services” within the meaning of the statute, and instead bear the characteristics of “telecommunications services.”⁹

While technology has evolved since the 1998 Report, the Commission’s observation that the regulatory classification of a service should be dependent upon the functionality experienced by the end-user remains valid. In the case of the Vonage service offering, customers are obtaining only voice transmissions, and are enjoying a service that is functionally equivalent to a LEC’s service offering. Therefore, the Commission should deny the petition, and declare that Vonage’s voice service is indeed a telecommunications service.

⁸ *Id.*, pp. 6-7.

⁹ 1998 Report, para. 89. This paragraph of the Report specifically addresses phone-to-phone IP telephony service. While Vonage’s petition claims at pp. 5-6 and p. 15 that it only offers a computer-to-phone or phone-to-computer service, at pp. 16-17 it justifies many of its arguments based on the Commission’s four conditions for determining that an IP-based service offers phone-to-phone functionality (*see* 1998 Report, para. 88). Furthermore, a personal computer is not necessarily required for a consumer to utilize Vonage’s service, as explained below.

C. The petition fails in its attempt to demonstrate that Vonage does not meet all four of the conditions the Commission established for determining that a VoIP service offers “phone-to-phone” functionality

Vonage attempts to argue¹⁰ that it does not meet two of the four conditions established in the 1998 Report for an IP-based service to be considered “phone-to-phone” IP telephony.¹¹ Vonage admits that it meets the Commission’s first condition, wherein the provider holds itself out as providing voice telephony or facsimile transmission service.¹² The petition further admits meeting the Commission’s third condition, wherein a service allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan and associated international agreements.¹³

However, Vonage is incorrect when it claims that it does not meet the Commission’s fourth condition,¹⁴ which states that a phone-to-phone IP service must transmit customer information without net change in form or content. Clearly, when one customer dials a standard telephone number and initiates a two-way voice transmission, there is no net change in form or content of the communication from the perspective of either user. The fact that the voice signal is converted into digital and/or IP format at some point in the transmission does not constitute a net change in form or content. This is evidenced by the fact that telephone companies have been converting voice signals into digital and packet formats for many years in order to efficiently transport the signals to distant termination points, where they are converted back to voice. Despite this

¹⁰ Petition, pp. 16-17.

¹¹ 1998 Report, para. 88. It should be noted that the conditions established in the 1998 Report were explicitly tentative. OPASTCO believes that first and foremost, the Commission must consider the real-world functionality of a service for end-users when determining its classification.

¹² See, fn. 5.

¹³ Petition, pp. 7-8.

¹⁴ *Id.*, p. 13.

conversion, the carriers in question are still providing “telecommunications services.”

Finally, Vonage claims that it does not meet the Commission’s second condition, which states that customers should not be required to use customer premises equipment (CPE) different from that CPE necessary to place an ordinary touch-tone call over the PSTN.¹⁵ This claim is undermined by the petition’s admission that Multimedia Terminal Adapters (MTAs) can be connected to “conventional analog telephone sets,” assuming a connection to “hardware or software that generates digital packets” is available.¹⁶ This demonstrates that standard personal computers are not necessarily required to use Vonage’s service. Connection of MTAs to analog telephones have been a fairly common experience in telecommunications for a number of years, as digital loop carrier systems and soft switches within the PSTN provide MTAs located at or near customer premises with the necessary capability to generate digital packets. Vonage’s voice transmission service should be classified the same as other voice services that utilize MTAs; that is, as a telecommunications service.

III. REGARDLESS OF HOW VONAGE’S SERVICE IS ULTIMATELY CLASSIFIED, THIS NEW VOIP SERVICE CONFIRMS THE NEED TO EXPAND THE BASE OF USE CONTRIBUTORS TO INCLUDE ALL FACILITIES-BASED BROADBAND INTERNET ACCESS PROVIDERS

Vonage states that its petition “is not intended to overlap with, or otherwise impact” ongoing dockets regarding intercarrier compensation, wireline broadband, universal service and 911 services.¹⁷ However, the overlap is clear and the impact is significant. This is especially true in the case of universal service.

As the telecommunications marketplace evolves toward broadband platforms and

¹⁵ *Id.*, p. 5.

¹⁶ *Id.*

IP networks, the shift away from more traditional telecommunications services will continue to “drain” the support base for universal service. This impact is even more pronounced when providers offer voice services over broadband platforms that are the functional equivalent of “plain old telephone service” (POTS), but the underlying broadband access provider is not required to contribute to universal service. Consequently, the inclusion of all facilities-based broadband Internet access providers as contributors to the USF becomes increasingly critical to maintaining the stability, sufficiency, and competitive neutrality of universal service.

The Commission has previously recognized that overall end-user switched interstate telecommunications revenues, which the contribution base presently relies upon, are now on the decline.¹⁷ Nevertheless, while the contribution base may be shrinking, overall demand for interstate telecommunications and information services has probably never been greater. The demand is simply shifting to service packages and service providers in which either the precise portion of revenues attributable to interstate telecommunications cannot easily be identified (e.g., wireless carriers) or the service provider is not currently required to contribute to universal service.

The gradual but ever-growing use of broadband platforms and IP networks plays a significant role in the present instability of the contribution base. Providers like Vonage serve to exacerbate this trend. As more and more voice traffic migrates to IP telephony – which is transported, in part, via broadband platforms that do not presently contribute to the USF – then the long-term viability of the Fund is threatened, as the

¹⁷ Petition, pp. 3-4 (citations omitted).

¹⁸ *Federal-State Joint Board on Universal Service, et. al.*, CC Docket No. 96-45, et. al., Further Notice of

General Accounting Office has predicted it might.¹⁹

Extending universal service assessments to all facilities-based broadband Internet access providers would address this issue by widening the current contribution base. Doing so would help keep the USF sustainable for the long term even as increasing amounts of voice traffic migrate away from traditional telecommunications carriers. This, in turn, would serve the public interest by helping to ensure that all Americans continue to have affordable access to quality telecommunications and information services. Furthermore, when some service providers are not required to contribute to universal service, the obligation upon those who are required to contribute is obviously greater. Spreading support obligations as widely as possible reduces each company's contribution, which, in turn, reduces the level of universal service costs that each carrier must ultimately pass on to their customers.

Moreover, the Commission's own principle of competitive neutrality²⁰ requires that all facilities-based broadband Internet access providers should contribute to universal service. At present however, only wireline telecommunications carriers are currently required to contribute on revenues earned from their DSL-based broadband transmission service. This disparate treatment of broadband Internet access service providers vis-à-vis their universal service obligations has created opportunities for regulatory arbitrage.

Broadband Internet access providers that are exempt from contributing to universal

Proposed Rulemaking, 17 FCC Rcd 3756, para. 8 (2002).

¹⁹ "As the deployment of IP telephony technologies move forward, and more businesses and consumers begin to substitute IP telephony for traditional telephone service, the question arises as to whether a decline in the funding for universal service could result." *Federal and State Universal Service Programs and Challenges to Funding*, Report to the Ranking Minority Member, Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, House of Representatives, General Accounting Office (rel. February 2002), p. 21-22 (GAO Report).

service have a competitive advantage over those who are required to contribute, as they do not need to recover any support payments from their end users.²¹

Regulations should not drive consumers to favor one type of provider or platform over another. Rather, telecommunications users should select a provider based on its services, quality, and prices. Thus, requiring facilities-based broadband Internet access providers over all platforms to contribute would eliminate the growing inequity and potential for marketplace distortions that arise under the current rules.

IV. CONCLUSION

Because Vonage's service is a substitute for traditional voice telephone service, it must be treated equitably with the voice services offered by other carriers. Therefore, the Commission should reject the petition, and explicitly classify Vonage's service as a telecommunications service. However, regardless of how the Commission decides to classify Vonage's service, the Commission should require all facilities-based broadband Internet access providers to contribute to the USF so that rural consumers continue to have access to affordable and "reasonably comparable" services and rates.

²⁰ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8801, para. 47 (1997).

²¹ *See*, GAO Report, p. 22, fn. 31. ("IP telephony calls, which do not include universal service charges [which, for large companies average between 8 to 12 percent of the total telephone bill] can mean a savings of around 10 percent on corporate telephone bills. This savings ... may make IP networks attractive to large business end users.")

Respectfully submitted,

**THE ORGANIZATION FOR THE PROMOTION
AND ADVANCEMENT OF SMALL
TELECOMMUNICATIONS COMPANIES**

By: /s/ Stuart Polikoff
Stuart Polikoff
Director of Government Relations

By: /s/ Stephen Pastorkovich
Stephen Pastorkovich
Business Development Director/
Senior Policy Analyst

By: /s/ Jeffrey Smith
Jeffrey Smith
Policy Analyst

By: /s/ John McHugh
John McHugh
Technical Director

21 Dupont Circle, NW
Suite 700
Washington, DC 20036
(202) 659-5990

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CERTIFICATE OF SERVICE

I, Stephen Pastorkovich, hereby certify that a copy of the comments by the Organization for the Promotion and Advancement of Small Telecommunications Companies was sent by first class United States mail, postage prepaid, or via electronic mail on this, the 27th day of October, 2003, to those listed on the attached sheet.

By: /s/ Stephen Pastorkovich
Stephen Pastorkovich

SERVICE LIST
WC Docket No. 03-211
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William B. Wilhelm
Russell M. Blau
Tamar E. Finn
Swindler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007

VIA E-MAIL

Janice M. Myles, Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
janice.myles@fcc.gov

Qualex International
qualexint@aol.com